Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

In The
Supreme Court of the United States

DEAN A. SINIBALDI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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October 29, 2008

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QUESTIONS PRESENTED FOR REVIEW

1. Should the jury have been instructed that an element of fraud is that of materiality, that is, a material fact or matter is one that has a natural tendency to influence or be capable of influencing a person's decision? Any misrepresentation or concealment must be reasonably calculated to deceive persons of ordinary prudence and comprehension.

2. Should failure to instruct the jury that materiality is defined by persons of ordinary prudence be analyzed under plain error or harmless error.

3. Should the indictment be dismissed for failure to include the element of materiality within it?

4. Should this Court grant Certiorari to clarify its holding in U.S. v. Santos, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2007) because lower courts are interpreting the holding differently?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eleventh Circuit were:

Gene A. Tyrrell, Appellant
Dean A. Sinibaldi, Appellant
Joseph Cuciniello, Appellant
United States of America, Appellee

TABLES OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLES OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 7

REASONS FOR GRANTING THE PETITION .. 10

1. Should the jury have been instructed that an element of fraud is that of materiality, that is, a material fact or matter is one that has a natural tendency to influence or be capable of influencing a person's decision? Any misrepresentation or concealment must be reasonably calculated to deceive persons of ordinary prudence and comprehension. 10

2. Should failure to instruct the jury that materiality is defined by persons of ordinary prudence be analyzed under plain error or harmless error. 13

3. Should the indictment be dismissed for failure to include the element of materiality within it? 15

4. Should this Court grant Certiorari to clarify its holding in U.S. v. Santos, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2007) because lower courts are interpreting the holding differently? 16

CONCLUSION 18

APPENDIX:

Appendix A: Eleventh Circuit decision (March 17, 2008) 1a

Appendix B: Eleventh Circuit decision regarding rehearing (July 30, 2008) 27a

Appendix C: Statutes 29a

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466, 120 S. Ct. 2348, L. Ed. 2d 435 (2000) 13

Associates & Adolescent Psychiatry, S.C. v. Home Life Insurance Company,
941 F.2d 561 (7th Cir. 1991) 11

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403, (2004) 13

Blount Financial Services, Inc. v. Walker E. Heller & Co.,
819 F.2d 151 (6th. Cir. 1987) 11

Cunningham v. California,
549 U.S. 270, 127 S.Ct. 856,
166 L.Ed.2d 856 13

Freeze v. State,
827 N.E.2d 600 (2005) 14

Griffin v. Kentucky,
93 L. Ed. 2d 649 (1987) 17

Lemon v. United States,
278 F.2d 369 (9th Cir. 1960) 10

Neder v. United States,
527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) 13, 14, 15

Russell v. U.S.,
369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) 15

Schriro v. Summerlin,
542 U.S. 348, 124 S. Ct. 2519 (2004) 17

Teague v. Lane,
489 U.S. 288, 109 S. Ct 1060 (1989) 17

U.S. v. Avery,
295 F.3d 1158 (2002) 15

U.S. v. Beitscher,
467 F.2d 269 (10th Cir. 1972) 10

U.S. v. Brien,
617 F.2d 299(1st Cir. 1980) 10

U.S. v. Brown,
79 F.3d 1550 (11th Cir. 1996) 10

U.S. v. Cochran,
109 F.3d 660 (10th Cir. 1997) 10

U.S. v. Daniels,
973 F.2d 272 (4th Cir. 1992) 15

U.S. v. Du Bo,
186 F.3d 1177 (9th Cir. 1999) 15

U.S. v. Faukowitz,
214 F.2d 365 (SDNY 2002) 10, 11

U.S. v. Fleming,
2008 WL 3824752 16

U.S. v. Forbes,
16 F.3d 1294 (1st Cir. 1994) 15

U.S. v. Frost,
125 F.3d 346 (6th Cir. 1997) 11

U.S. v. Helund,
2008 WL 4183958 16

U.S. v. Hooker,
841 F.2d 1225 (4th Cir. 1988) 15

U.S. v. Maxwell,
920 F.2d 1028 (D.C. Cir. 1990) 10

U.S. v. Mojica-Baez,
229 F.3d 292 (1st Cir. 2000) 15

U.S. v. Netterville,
553 F.2d 903 (5th Cir. 1997) 10

U. S. v. Orosco,
___ F.2d ___, 2008 WL 4194878 16

U.S. v. Prentiss,
207 F.2d 960 (10th Cir. 2000) 15

U.S. v. Santos,
128 S. Ct. 2020, 170 L. Ed. 2d 912 (2007) . 16, 17

U.S. v. Spinner,
180 F.3d 514 (3rd Cir. 1992) 15

U.S. v. Svete,
521 F.3d 1302 (11th Cir. 2008) 13

U.S. v. Thompson,
2008 WL 2514090 (E.D. Tenn.) 16

U.S. v. Yusuf,
536 F.3d 178 16

Statutes

15 U.S.C. § 77E(a) 1

15 U.S.C. § 78J(b) 1

18 U.S.C. § 1341 1

18 U.S.C. § 1956 16

18 U.S.C. § 1956(a)(1)(A)(i) 1

18 U.S.C. § 1957 1

18 U.S.C. § 371 1

28 U.S.C. § 1254 1

Other Authorities

Zingale, *Fashioning a Victim Standard by Mail and Wire Fraud: Ordinary Prudent Person or Monumentally Credulous Goal?*, 99 Columbia Law Review 795 (1999) 10

OPINIONS BELOW

The Eleventh Circuit in an unpublished opinion on March 17, 2008, affirmed the convictions. In an also unpublished opinion on July 30, 2008 the petition for rehearing was also denied. These opinions are located in the Appendix.

JURISDICTION

The petition for rehearing was denied on July 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

18 U.S.C. § 371, 15 U.S.C. § 78J(b), 15 U.S.C. § 77E(a), 18 U.S.C. § 1341, 18 U.S.C. § 1957, 18 U.S.C. § 1956(a)(1)(A)(i).

STATEMENT OF THE CASE

1. The Appellant, DEAN A. SINIBALDI, was indicted on December 10, 2002 (Doc. #32).

2. Mr. Sinibaldi was arrested on December 17, 2002 (Doc # 17). On the same day an Initial Appearance was held by Judge Jenkins (Doc # 51) and a $50,000 non-surety bond was set (Doc #52).

3. On January 15, 2003, Mr. Sinibaldi was Arraigned before Judge Pizzo and a not guilty plea was entered. (Doc# 92).

4. On November 16, 2004, a Second Superseding Indictment was filed (Doc# 577).

5. On January 21, 2005, a Bill of Particulars was filed by the Government (Doc. # 644)

6. On January 26, 2005 Mr. Sinibaldi filed a Motion to Continue Trial (Doc. # 647), which was denied by the Court on February 2, 2005 (Doc. # 662) as well as a Motion to Strike F.R.C.P. 404(b) Evidence (Doc # 648) which the Government responded to on February 6, 2005 (Doc. # 697) and the Court denied on February 8, 2005 (Doc. # 708).

7. On January 31, 2005, Mr. Sinibaldi filed a Motion in Limine to preclude evidence of prior bad acts, which the Court denied on February 8, 2005 (Doc. # 708), and an Emergency Motion for Depositions (Doc. # 657) which was granted by the Court on February 2, 2005 (Doc. # 663).

8. On February 4, 2005, the Government filed a Second Bill of Particulars (Doc # 66) as well as Notices of Lis Pendens against Mr. Sinibaldi's property (Doc #'s 670-685).

9. On February 7, 2005,the Government filed First Addendum to the Second Bill of Particulars (Doc # 705)

10. On February 7, 2005, Jury selection commenced (Doc. # 707).

11. On February 16, 2005, Mr. Sinibaldi filed an objection to the Government's Motion in Limine

(Doc. # 754 regarding Doc. #738) which the Court denied on February 24, 2005 (Doc. # 788).

12. On February 17, 2005, Mr. Sinibaldi filed a Motion to Limit Expert Legal Opinion (Doc #. 765) which the Court denied on (February 24, 2005 (Doc. # 789).

13. On February 18, 2005, the Government filed a Motion for Permission for the Expert and Summary Witnesses to Observe Portion of the Trial (Doc. # 766).

14. Again on February 18, 2005, the Government filed. additional Lis Pendens against Mr. Sinibaldi's property (Doc #'s 770-772).

15. On February 22, 2005, the Appellant moved for mistrial because of the trial Courts allowance of Government witnesses Stutts and Janicus to observe testimony after the sequestration rule was invoked. (Doc. # 778) and also because the Mayor of San Lorenzo would be allowed to testify to issues he had no personal knowledge of (Doc. # 780), both of which were denied (Doc #'s 779 and 781 respectively)

16. On February 23, 2005, the Appellant moved for a mistrial because witness Stutts was present during other witness' testimony (Doc.# 784) which the Trial Court denied (Doc. # 785).

17. On February 25, 2005, Mr. Sinibaldi filed a Motion for Disclosure of Material Relevant to Expert Testimony Pursuant to Rule 703(Doc #

795) which the Trial Court denied as moot on April 26, 2005. (Doc # 982).

18. On February 28, 2005, the Appellant moved for mistrial because Agent Nance testified to details of the State of Florida investigation of another security not related to the instant case (Doc. # 802) which the Trial Court denied (Doc # 803).

19. On March 1, 2005, Mr. Sinibaldi again moved for mistrial because witness Lavis testified to the fact that she had to take out a loan implicitly because of the MIT investment loss (Doc.# 805) which the Court denied (Doc. # 806).

20. On March 8, 2005, the Government filed a Trial Brief concerning the admission of receivers reports and business records into evidence (Doc # 816). In response, Mr. Sinibaldi filed an objection on March 13, 2005 (Doc. #. 825).

21. On March 15, 2005, Mr. Sinibaldi declared an oral motion for severance of Co-Defendant Schultz (Doc. # 832) which the Trial Court denied without prejudice (Doc. # 833), and immediately following Mr. Sinibaldi moved for mistrial (Doc. # 834) which the Court also denied (Doc. # 835).

22. Again on March 16, 2005, the Appellant moved for severance of Co-Defendant Schultz (Doc. # 843) which the Court granted (Doc. # 844).

23. On March 17, 2005, Mr. Sinibaldi declared an oral motion to redact the state court documents

to avoid prejudice during Mr. Lipson's testimony, (Doc. # 857) which the Court denied (Doc. # 858). Mr. Sinibaldi subsequently declared a motion for mistrial (Doc. #859) which the Court also denied (Doc. # 860).

24. On March 29, 2005, the Appellant declared an oral motion for severance (Doc. # 886) which the Court denied (Doc. # 887).

25. On that same day, Mr. Sinibaldi moved to strike the testimony of Hilda Burgi because the Government asked her to authenticate a check that she had never seen (Doc. # 888) which the Court denied (Doc. # 889).

26. Also, Mr. Sinibaldi moved to Dismiss the Indictment (Doc. # 890) which the Court denied (Doc. # 891) and Mr. Sinibaldi immediately moved for mistrial (Doc. # 892) which the Court also denied (Doc. # 893).

27. On March 29, 2005, the Appellant moved for mistrial (Doc. # 902) which the Court denied (Doc. # 903).

28. On April 1, 2005, Mr. Sinibaldi filed his Proposed Jury Instructions with the Court (Doc. # 917)

29. On April 3, 2005, the Government filed a response to the Trial Courts accelerated time line for trial (Doc. # 920).

30. On April 4, 2005, the Appellant made an oral motion to continue (Doc.# 922) which the Court

denied (Doc. # 923) and then moved for a motion for mistrial (Doc. # 924), which the Court also denied (Doc. # 925).

31. On April 11, 2005, Mr. Sinibaldi filed a 17 page Motion for Judgment of Acquittal Doc. # 939) which the Court granted in part and denied in part on April 18, 2005 (Doc. # 958).

32. On April 12, 2005, the Appellant filed a Motion for Reconsideration to Strike Government's Exhibit 31A-4 (Doc. # 947).

33. On April 15, 2005, the Appellant filed a Memorandum concerning the testimony of Attorney Murray Silverstein (Doc. # 954).

34. On April 17, 2005, Mr Sinibaldi filed additional proposed jury instructions with the Court (Doc. # 956).

35. On April 18, 2005, Mr. Sinibaldi declared an oral order for mistrial (Doc. # 960) which the Court denied (Doc. # 961).

36. On April 20, 2005, the Appellant moved for a motion for mistrial (Doc. # 969) which the Court denied (Doc. # 970).

37. On April 21, 2005, the Jury returned a verdict as to Mr. Sinibaldi declaring him not guilty on counts 5, 14-20, and 22 and guilty as to counts 1-3, 7-13, and 23-38. (Doc. # 980).

38. On April 25, 2005, Mr. Sinibaldi filed a Motion to Extend the Time Allotted for Filing the

Motion for New Trial to 30 days (Doc. # 985) which the Court granted (Doc. # 986).

39. On May 10, 2005, the Appellant filed a Motion for Reconsideration of his previously filed Motion for Judgment of Acquittal. (Doc. # 1004) and a Motion for New Trial (Doc. # 1005), both of which the Court denied (Doc.# 1068 and 1069 respectively).

40. On August 3, 2005, Mr. Sinibaldi filed a Motion for Bond Pending Appeal (Doc. # 1102) which was denied by the Court on August 12, 2005 (Doc. # 1115).

41. On August 12, 2005, Mr. Sinibaldi was sentenced to168 months incarceration, followed by 36 months of supervised release and restitution in the amount of $5,333,334 (Doc. # 1116).

42. On August 16, 2005, the Judgment was filed as to Mr. Sinibaldi (Doc. # 1121) and Mr. Sinibaldi filed his Notice of Appeal (Doc. # 1122).

43. The Eleventh Circuit affirmed the conviction in an unpublished opinion on March 17, 2008.

44. The Eleventh Circuit denied the petition for rehearing on July 30, 2008.

STATEMENT OF FACTS

Dean A. Sinibaldi is a licensed real estate and insurance salesman in the State of Florida. In 1984 Mr. Sinibaldi received his Florida insurance license

and began selling insurance products. In 1996 Mr. Sinibaldi started a company called Delta Financial in Fort Myers, Florida which provided various insurance services. Mr. Sinibaldi became a well known and successful member of the community. On September 19, 1996, Greg Schultz and Danny Way began the Millennium Investment Trust (MIT). (Doc. # 1201, P. 29). During the fall of 1997, Greg Schultz approached Dean Sinibaldi and provided him information regarding MIT. Mr. Schultz informed Mr. Sinibaldi that he was a securities attorney and that he was a former securities administrative law judge from Michigan. (Doc. # 1201, P. 29). Mr. Schultz also told Mr. Sinibaldi that the MIT product invested in up-and-coming companies that were going to go public, or had recently done so, and that Mr. Schultz had obtained a Bankers Acceptance from the Bank of Bermuda that guaranteed the investor's principle in case of a default. (Doc. # 1201, P. 32). Furthermore, Mr. Schultz informed Mr. Sinibaldi that the MIT product was exempt from registration with the State of Florida and the SEC. (Doc. # 1201, P. 28).

After Mr. Schultz explained the high points of the MIT Investment, he asked Mr. Sinibaldi to market the MIT product and included Mr. Sinibaldi as a member of the Executive Committee. (Doc. # 1201, P. 30). Before Mr. Sinibaldi entertained the offer he visited the underlying investments of MIT and discovered that they indeed existed and appeared to be flourishing. (Exhibit 31B, p 30-36)

Meanwhile, in mid 1998, Greg Schultz joined forces with Joseph Cuciniello and began another investment product which they named StoneHedge Group, Inc. (SHG) (Doc. # 1201, P. 34). Subsequently, a State of

Florida investigation began against SHG followed by an investigation against MIT. (Doc. # 1201, P. 40). It should be noted that Mr. Sinibaldi's last sale was in July of 1999, before the filing of the Motion for Temporary Injunction Order. By the culmination of the investigation which was the Filing of a Temporary Injunction Order on October 27, 1999. Mr. Sinibaldi had disassociated with MIT. (Doc. # 1201, P. 41).

From April of 1997 until October 27, 1999, when the State of Florida received a Temporary Injunction Order against MIT, Mr. Sinibaldi marketed only the MIT Investment based on the selling points in the prospectus provided to him by Mr. Schultz and neither participated nor interacted with the SHG group or their product. (Doc. # 1201, P. 42) . During this time, Mr. Sinibaldi was advised by some of his clients that they had not received their interest checks from MIT. In response Mr. Sinibaldi contacted Mr. Schultz to complain and was informed by Mr. Wey that the interest checks were going to be late due to the lack of liquidity. (Doc. # 1217, P. 106) In response, Mr. Sinibaldi issued checks for the interest amount owed to his clients from his company, Delta Financial, and from his personal account with the understanding that MIT would reimburse him. (Doc. # 1201, P. 85; Doc.# 1217, P 107). Furthermore, after Mr. Sinibaldi was informed of the liquidity problem, he agreed to accept stock in the underlying companies of the MIT investment as opposed to a paycheck. (Doc. # 1217, P. 124). In July of 1999 Mr. Sinibaldi became aware of trouble with MIT. On October 27, 1999, Mr. Sinibaldi was informed of the Temporary Injunction against MIT and ceased marketing the MIT product. (Doc. # 1201, P. 42, 87).

REASONS FOR GRANTING THE PETITION

1. **Should the jury have been instructed that an element of fraud is that of materiality, that is, a material fact or matter is one that has a natural tendency to influence or be capable of influencing a person's decision? Any misrepresentation or concealment must be reasonably calculated to deceive persons of ordinary prudence and comprehension.**

A circuit split exists as to whether misrepresentation or concealment must be reasonably calculated to deceive persons of ordinary prudence and comprehension or where the most gullible persons would be deceived. The Eleventh Circuit in U.S. v. Brown, 79 F.3d 1550 (11th Cir. 1996), adopted the objective standard of a person of ordinary prudence or comprehension. The objective standard is not tied directly to the experiences of a specific person or persons. The Tenth Circuit in U.S. v. Cochran, 109 F.3d 660 (10th Cir. 1997), held that the objective reference to persons of ordinary prudence or comprehension assists in determining whether the accused's conduct was calculated to deceive. U.S. v. Faukowitz, 214 F.2d 365 (SDNY 2002); U.S. v. Netterville, 553 F.2d 903 (5th Cir. 1997); U.S. v. Beitscher, 467 F.2d 269 (10th Cir. 1972).

Two other circuits have used the most gullible person standard. U.S. v. Brien, 617 F.2d 299 (1st Cir. 1980); U.S. v. Maxwell, 920 F.2d 1028 (D.C. Cir. 1990); Lemon v. United States, 278 F.2d 369 (9th Cir. 1960). An excellent law review article also discusses the two different standards. Zingale, *Fashioning a Victim Standard by Mail and Wire Fraud: Ordinary Prudent*

Person or Monumentally Credulous Goal?, 99 Columbia Law Review 795 (1999).

The Sixth Circuit has not answered the question directly but has approved an objective standard. U.S. v. Frost, 125 F.3d 346 (6th Cir. 1997). The Sixth Circuit in Blount Financial Services, Inc. v. Walker E. Heller & Co., 819 F.2d 151 (6th. Cir. 1987) held that an objective standard should be used. The Seventh Circuit in Associates & Adolescent Psychiatry, S.C. v. Home Life Insurance Company, 941 F.2d 561 (7th Cir. 1991) adopted the persons of ordinary prudence standard. As noted in U.S. v. Falkowitz, 214 F.2d 365 (SDNY) there is "apparent disarray" even within the circuits. *Id. At 377.* As Judge Marrero stated:

> The Ninth Circuit's ruling in *Ciccone* adopted the lower threshold that it is immaterial whether only the most gullible could have been deceived. 219 F.3d at 1083 (citing *United States v. Hanley,* 190 F.3d 1017, 1023 (9th Cir.1999) and *Lemon v. United States,* 278 F.2d 369, 373 (9th Cir.1960)). At the same time, that court acknowledged, without specifically overruling, earlier precedents that endorse the standard requiring that a scheme to defraud be reasonably calculated to deceive persons of ordinary prudence and comprehension. *See id.* (citing *United States v. Bohonus,* 628 F.2d 1167, 1172 (9th Cir.1980), *United States v. Mason,* 902 F.2d 1434, 1442 (9th Cir.1990) and *United States v. Green,* 745 F.2d 1205, 1209 (9th Cir.1984)). A similar ambiguity as to the applicable test is manifest in still extant precedents in other circuits. *Compare United States v. Brandon,* 17 F.3d 409, 425 (1st

Cir.1994), with *Brien,* 617 F.2d at 311; *Davis,* 226 F.3d at 358-59, with *United States v. Netterville,* 553 F.2d 903, 908 (5th Cir.), *cert. denied,* 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977); *United States v. Van Dyke,* 605 F.2d 220, 225 (6th Cir.), *cert. denied,* 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979) with *Bogy v. United States,* 96 F.2d 734, 741 (6th Cir.), *cert. denied,* 305 U.S. 608, 59 S.Ct. 68, 83 L.Ed. 387 (1938); *Spiegel v. Cont'l Ill. Nat'l Bank,* 790 F.2d 638, 646 (7th Cir.1986), with *United States v. Coffman,* 94 F.3d 330, 333-34 (7th Cir.1996); *Rudd v. United States,* 173 F. 912, 913-914 (8th Cir.1909), with *Goodman,* 984 F.2d at 235.

The *Coffman* court, noting the apparent internal and inter-circuit conflicts in the standards articulated by various Courts of Appeals, expressed doubt that there is real inconsistency in these rulings. Endeavoring to reconcile the discrepancies, the court postulated that the "reasonable person" language cited by some courts was employed not as a reference to the intended victims of fraud but "to guide the jury in evaluating circumstantial evidence of fraudulent intent: that the defendants' scheme was calculated to deceive a person of ordinary prudence is some evidence that it was intended to deceive" and to "gesture [ ], although clumsily, toward the indistinct border zone between real fraud and sharp dealing." *Id.* This explanation, however, does not satisfactorily account for the evidentiary requirement imposed by a ruling such as *Brown,* where the court elevated the "reasonable person" test to a distinct element of the offense that the

government must establish with sufficient proof. *See Brown,* 79 F.3d at 1558 ("Federal criminal fraud requires proof that a person of ordinary prudence would rely on a representation or deception"). *Id at 378.*

This Court in Neder v. United States. 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), held that materiality of falsehood is an element of federal mail fraud, wire fraud and bank fraud statutes. The standard to be applied under the definition of materiality should, therefore, be included in any jury instruction. The Eleventh Circuit is now *en banc* considering the issue of omitting the requirement of ordinary prudence constitutes reversible error. U.S. v. Svete, 521 F.3d 1302 (11th Cir. 2008), *en banc* review has been granted.

2. Should failure to instruct the jury that materiality is defined by persons of ordinary prudence be analyzed under plain error or harmless error.

This Court in Neder v. United States, 527 U.S. 1, 119 Sup. Ct. 1827, 144 L. Ed. 2d 35 (1999), held that faulty jury instruction omitting an element should be analyzed under the harmless error standard. The Petitioner asks the Court to reconsider its harmless error ruling in Neder because of the developing Sixth Amendment case law requiring a jury finding of facts since that time. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403, (2004); Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856.

Judge Barnes of the Indiana Court of Appeals in Freeze v. State, 827 N.E.2d 600 (2005) questioned the continued validity of Neder. The Court held:

> We believe the validity of *Neder* might be short-lived, in light of the seismic shift in the Supreme Court's Sixth Amendment jurisprudence since 1999. Specifically, Justice Scalia wrote a vigorous dissent in *Neder,* joined in part by Justice Stevens and fully by Justices Ginsburg and Souter-in other words, four of the five members of the *Blakely* majority. Justice Thomas, the fifth *Blakely* justice, was in the *Neder* majority. After *Neder,* and beginning at least with *Apprendi,* he has repudiated a narrow interpretation of the Sixth Amendment jury trial right and has joined Justice Scalia's broad view of it. *See also Shepard v. United States,* 544U.S. 13, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (Thomas, J., concurring) (disavowing his concurring vote in *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), a five-four Sixth Amendment decision upon which criminal history "exception" to *Apprendi- Blakely* rule is based). Additionally, *Neder* itself cautions that "safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error ... it should not find the error harmless." *Neder,* 527 U.S. at 19, 119 S.Ct. at 1838. *Id at 605-606.*

3. Should the indictment be dismissed for failure to include the element of materiality within it?

The indictment in this case did not include the element of materiality or a definition thereof. The petitioner would argue that this constituted plain error. A number of circuits undertaking a Fifth Amendment analysis of a failure to include an element in an indictment as plain error. Even if this Court were to continue to hold that the failure to submit an element of an offense to a petit jury is subject to harmless error analysis, because it is simply an error in the trial process itself not applied to errors in the grand jury indictment. The Neder rule should not apply to grand jury jurisprudence because we cannot guess as to what was in the minds of the grand jury at the time of the indictment. U.S. v. Prentiss, 207 F.2d 960 (10th Cir. 2000); U.S. v. Du Bo, 186 F.3d 1177 (9th Cir. 1999); Russell v. U.S., 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962); U.S. v. Daniels, 973 F.2d 272 (4th Cir. 1992); U.S. v. Spinner, 180 F.3d 514 (3rd Cir. 1992); U.S. v. Hooker, 841 F.2d 1225 (Ca4 1988).

A plain error analysis should be used in determining whether a violation of a grand jury right under the Fifth Amendment should be reversed. U.S. v. Mojica-Baez, 229 F.3d 292 (1st Cir. 2000); U.S. v. Avery, 295 F.3d 1158 (2002). The objection to the indictment may be raised for the first time on appeal. U.S. v. Forbes, 16 F.3d 1294 (1st Cir. 1994)

4. Should this Court grant Certiorari to clarify its holding in U.S. v. Santos, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2007) because lower courts are interpreting the holding differently?

The Third Circuit in U.S. v. Yusuf, 536 F.3d 178 agreed with the plurality of this Court in Santos. In U. S. v. Orosco, ___ F.2d ___, 2008 WL 4194878 (D. Col.) held that this Court only applied Santos to proceeds from an illegal gambling activity. The Third Circuit in U.S. v. Fleming, 2008 WL 3824752 (3rd Cir. (Virgin Islands)) held that the following in Santos applies only to proceeds in an illegal gambling operation.

The District Court in the Northern District of California held in U.S. v Helund, 2008 WL 4183958 (N.D. Cal) that Santos does apply to any proceeds of a money laundering activity. Senior District Judge Leon Jordan of the District Court of the Eastern District of Tennessee in U.S. v Thompson, 2008 WL 2514090 (E.D. Tenn.) agreed and held that proceeds applies to money laundering offenses under 18 U.S.C. § 1956.

The defendant attempted to raise the proceeds issue decided by U.S. v. Santos in an amended motion for rehearing or in the alternative to file a supplemental brief pursuant to U.S. v. Santos in the Eleventh Circuit. The Eleventh Circuit denied the motion for rehearing because it held that circuit law prevents new issues being raised in a motion for rehearing. There is absolutely nothing in the record that suggests the government prosecuted the defendant for, or that he was convicted of, of laundering "proceeds" as defined by this Court as profits. Justice Scalia held in Santos that rule of

lenity applies, and the defendant should be granted a new trial. The evidence put forth by the government only showed that the defendant conducted "expense" based transactions. The theory of the government was that the clients of the defendant made checks payable to Millennium Investments, Inc. which he turned directly over to this corporation. Millennium Investments, Inc. then paid commissions to the defendant which constituted gross receipts of the company. He paid expenses from those gross receipts including rent, phone, electric and sales commissions. The defendant is still on direct review and should be permitted to raise this issue. Griffin v. Kentucky, 93 L. Ed. 2d 649 (1987).

In addition, the petitioner submits that the holding in Santos constitutes a new rule. His trial and appellate counsel could not have anticipated that Santos would have defined proceeds as it did. Consequently, Santos should be applied to this case because it is still on direct review. Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519 (2004).

A case announces a new rule when it breaks new ground or imposes a new obligation on the states or the federal government. Teague v. Lane, 489 U.S. 288, 109 S. Ct 1060 (1989).

CONCLUSION

The appellant, Dean A. Sinibaldi urges this Court to accept this Petition for a Writ of Certiorari to the Eleventh Circuit.

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October 29, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 05-14492

[Filed March 17, 2008]

UNITED STATES of America, Plaintiff-Appellee,	)
v.	)
Gene A. TYRRELL, Dean A. Sinibaldi, Joseph Cuciniello, Defendants-Appellants.	)

Appeals from the United States District Court
for the Middle District of Florida

Before EDMONDSON, Chief Judge, CARNES and FAY, Circuit Judges.

PER CURIAM:

Dean A. Sinibaldi ("Sinibaldi"), Joseph Cuciniello ("Cuciniello"), and Gene A. Tyrrell ("Tyrrell"), were part of a conspiracy group which sold false and unregistered security offerings through the Millenium and Stonehedge Groups and caused great losses to many elderly individuals. Appellants were convicted on specific charges of securities fraud, mail fraud,

money laundering, selling of unregistered securities, and conspiracy. Sinibaldi, Cuciniello, and Tyrrell raise numerous issues[1] challenging evidentiary rulings,

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[1] The issues are:

1. Whether the district court abused its discretion in denying the defendants' motions for mistrial after the severance of the case against Schultz (Cuciniello's issue by adoption; Tyrrell's issue by adoption);

2. Whether the district court abused its discretion in allowing the admission of evidentiary rulings including: Miscellaneous Business Records, Abel Flores Reyes' Testimony, Albert Melchoir and expert witness Charles Stutts' testimony, Receiver Gary Lipson's testimony, and Sinibaldi's "RIA" certification status;

3. Whether the district court abused its discretion in declining to substitute juror Bennett with an alternate juror;

4. Whether the district court correctly denied Sinibaldi judgments of acquittal as to the mail fraud and other challenged counts of conviction;

5. Whether the district court correctly denied Sinibaldi a judgment of acquittal as to the conspiracy charged in count one;

6. Whether Sinibaldi was entitled to a new trial based on asserted cumulative error;

7. Whether the district court erred in calculating the loss attributable to Sinibaldi pursuant to U.S.S.G. § 2F1.1(b)(1)(1998) or plainly err in ordering restitution in the amount of that loss;

8. Whether the district court correctly denied Cuciniello's motions of judgments of acquittal or a new trial;

9. Whether the district court abused its discretion in declining to dismiss the indictment based on alleged prosecutorial vindictiveness;

legal rulings, their convictions, and the sentences imposed.[2] We affirm.

Factual Background

Millennium Investment, Inc. ("MII") was created for the alleged purpose of helping new businesses become publicly traded companies. Defendants Danny Wey ("Wey") and Gregory G. Schultz ("Schultz") served as officers and directors of MII. Shortly thereafter, Millennium Investment, Inc. Trust ("MIIT") was created to market and sell unregistered notes. The funds raised by MIIT were remitted to MII. Schultz's duties included serving as legal counsel to the Millenium entities, drafting MIIT offering documents, and directing MIIT's fund-raising efforts. Wey's duties included identifying the investments in which MIIT could place its funds. Although Wey had a criminal background which included a federal conviction of

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10. Whether Cuciniello's guidelines-range sentence was unreasonable;

11. Whether the district court correctly denied Tyrrell's motions for judgments of acquittal or a new trial; and

12. Whether the district court erred in failing to declare a mistrial as to all defendants when defendant Schultz was severed midway through the trial.

[2] Sinibaldi was sentenced to a total of 168 months imprisonment, 36 months of supervised release, and restitution of $5,333,374. Cuciniello was sentenced to total of 210 months' imprisonment, 36 months of supervised release, and restitution of $15,290,601.38. Tyrrell was sentenced to 136 months imprisonment, 36 months supervised release, and restitution of $10,200,307.95.

felony fraud offenses, MIIT investors were not so advised despite MIIT disclosure documents with experience profiles for both Wey and Schultz.

Once MIIT commenced its operations, Schultz informed Wey that MIIT notes which matured in less than nine months were exempt from state and federal registration requirements under the "commercial note exemption." Also, several of the notes MIIT issued included a "banker's acceptance" provision stating that the Bank of Bermuda Limited, which is one of the largest banks in the Carribean, would guarantee the notes in the event of default. As was ultimately discovered, this bank had never issued a "banker's acceptance" or any other guarantee to MIIT. In fact, neither the bank nor any of its subsidiaries had ever had a relationship with MIIT, its officials or entities.

Sinibaldi was the top seller at MIIT. For six months, he was involved in fifty-eight MIIT transactions, valued at $1,655,235.68, that purported to be secured by the banker's acceptance provision. He assured investors that MIIT notes were fully secured by the Bank of Bermuda and were a completely safe investment. At first, Sinibaldi received a commission of up to ten percent of any MIIT investments he secured, but in order to evade securities laws, Schultz determined that this compensation should be characterized as "consulting or advisory payments," even though Sinibaldi never offered any marketing or consulting services to the Millenium entities. Over a two year period, Sinibaldi and his company, Delta Financial Services, Inc., received a total of $465,234.47 in cash payments and additional securities from MII (which were sold for about $85,000). From October 1996 to July 1999, individuals invested more than $6

million in MIIT securities; however, by July 1999, MIIT had more than $1 million in past-due notes. Furthermore, despite the fact that MIIT had defaulted on its obligations in October 1998, defendants falsely informed new investors that MIIT notes offered "good security." By mid-1999, MIIT stopped raising funds.

Defendants then formed the Stonehedge entities. Securities from these entities were marketed through individuals in the financial or insurance business, allegedly to provide funding to companies that were about to make public stock offerings. The Stonehedge offering material stated that "Stonehedge invests their portfolio in a company called Millenium as its vehicle for making the investments." Stonehedge also advised investors that Millennium principals had over 40 years of experience in taking companies public.

From August 1998 to November 1999, Cuciniello incorporated eight Stonehedge entities in Florida. Then in September and October 1999, despite being aware of an ongoing investigation of defendants' fraudulent activities by the Florida Department of Banking and Finance ("DBF"), Cuciniello incorporated another seven Stonehedge entities in New York. Cuciniello served as an officer of several Stonehedge entities, was an authorized signator for ten Stonehedge-related bank accounts, and participated in seminars to train others to market Stonehedge securities. Between March 1998 and April 2001, Cuciniello and his family received more than $850,000 from Stonehedge entities.

From March 1998 through November 2000, more than $12.5 million was invested in the Stonehedge offerings. Only about twenty percent of this money was

invested as represented in the Stonehedge offering materials. However, up to thirty-three percent of these invested funds were paid out as commissions to those involved in the process.

In January 1998, Cuciniello brought co-defendant Robert Phillips ("Phillips") to the Stonehedge program. At a meeting held in Clearwater, Florida, Schultz provided further detail to Phillips about the program. Phillips then agreed to market the Stonehedge program through his network of insurance agents, West Coast Distributors, Inc. ("West Coast"). Out of every Stonehedge investment placed by Phillips's agents, West Coast would receive a commission of up to twenty-seven percent. In order to evade state and federal securities laws, Schultz told Phillips that these payments must be characterized as "referral fees" rather than "commissions."

In the fall of 1998, Phillips recruited Tyrrell to sell Stonehedge securities. After Tyrrell's involvement in the Stonehedge securities, the funds invested increased dramatically, from approximately $30,000 to $100,000 per month to as much as $1,000,000 per month. His sales organization was the largest of all the sales organizations engaged in the Stonehedge marketing effort. Tyrrell participated in and created a training manual for seminars to train new agents to market Stonehedge securities. Also, Tyrrell was the president, secretary, treasurer, and sole shareholder of one of the entities-The Stonehedge Group, Inc.-X, and thus executed the shares of stock issued in connection with this entity.

From March through July 1999, DBF served investigative subpoenas for testimony and documents

on MIIT, Sinibaldi, Global Research International, Inc., and many of the Stonehedge entities. Before responding to the subpoenas, defendants tried to conceal their fraudulent activities by supplementing MIIT investor files with backdated correspondence, and modifying and supplementing Stonehedge investor files to give them the appearance of conforming to applicable state and federal securities laws.

In October 1999, DBF filed a civil action in Pinellas County, Florida, seeking an injunction and appointment of a receiver for MII, MIIT, various Stonehedge entities, and First Dominion Venture Capital, Inc., and named as "relief defendants" Schultz, Wey, Cuciniello, and Sinibaldi. The state circuit court granted DBF's requests, entered an injunction, and appointed attorney Gary Lipson as receiver.

The defendants ceased using the Millennium and Florida based Stonehedge entities and turned all of their attention to the New York-based Stonehedge offerings. There they raised more than $3.2 million from November 1999 through November 2000. Despite the millions of dollars raised through the sale of these unregistered securities, Millenium investors lost more than $5.3 million and Stonehedge investors lost more than $11.4 million. Sinibaldi, Cuciniello, and Tyrrell invested none of their money in any of these entities.

After the state circuit court made its rulings, Cuciniello convinced Phillips that the injunction did not prevent him from marketing Stonehedge securities outside of Florida. Thereafter, the Stonehedge sales that Phillips and his agents made were processed through Tyrrell's Arizona-based company, Innovative

Financial Concepts, LLC ("IFC"). About seven weeks after the injunction was entered, Phillips withdrew from the Stonehedge program.

Before Lipson's appointment, Tyrrell received his commissions from West Coast, through IFC. After the appointment, Tyrrell began to receive his commissions from the New York-based Stonehedge XII entity through another Arizona-based company recently registered by his wife-TMT Consulting. Payments to TMT Consulting were typically remitted to IFC.

The jury convicted Sinibaldi on the overarching conspiracy count, two counts of securities fraud, three counts of selling unregistered securities, four counts of mail fraud, conspiracy to commit money laundering, eight counts of engaging in illegal monetary transactions, and seven counts of money laundering. Cuciniello was convicted on the overarching conspiracy count, one count of securities fraud, three counts of selling unregistered securities, eight counts of mail fraud, conspiracy to commit money laundering, seven counts of engaging in illegal monetary transactions, and seven counts of money laundering. Tyrrell was convicted on the overarching conspiracy count, one count of securities fraud, seven counts of mail fraud, conspiracy to commit money laundering, and seven counts of money laundering. This appeal followed.

Discussion

I. *Defendants' Motions for Mistrial after Severance and Challenge to Standby Counsel*

Schultz originally represented himself *pro se,* but due to apparent health problems, he suffered a

blackout and collapsed in court. Because of Schultz's illness and admittance to a hospital, the court appointed stand-by counsel on his behalf. The court explained this change to the jury. On March 16, 2005, because Schultz continued to suffer tremendous pain and had difficulty concentrating, the district court severed his case and granted him a mistrial.

Appellants first challenge their motion for a mistrial based upon the severance of Schultz from the remainder of the trial. The basis of this argument was the prejudicial effect of the jury's observation of Schultz's apparent health problems. Sinibaldi also challenges the district court's appointment of standby counsel for Schultz. After a thorough review of the record, we conclude that none of these arguments provide any basis for relief.

We review a district court's denial of a severance for abuse of discretion. *See U.S. v. Day*, 405 F.3d 1293, 1297 n. 3 (11th Cir. 2005). First, the district court was correct in initially denying a severance because "the general rule is that defendants who are jointly indicted should be tried together, particularly in conspiracy cases." *U.S. v. Baker*, 432 F.3d 1189, 1236 (11th Cir. 2005) (citing *U.S. v. Pedrick*, 181 F.3d 1264, 1272 (11th Cir. 1999)). Next, Sinibaldi has no standing to challenge the district court's appointment of Schultz's standby counsel, only Schultz has such standing. The jury observed Schultz's health problems before the appointment of counsel and the court properly explained the appointment to them. The jury was fully instructed to draw no inferences from such. Thus, Sinibaldi's arguments that the jury would have interpreted the appointment as an indication of guilt is without merit and there was no abuse of discretion.

Sinibaldi also argues that Schultz's ultimate severance from the trial deprived the remaining defendants of Schultz's assistance in their joint defense. We find this argument frivolous. Schultz was available as a witness, but was never called by anyone.

Sinibaldi argues that the defendants were prejudiced because evidence of events in which only Schultz had been involved was introduced at trial. Because this case involves a conspiracy, all defendants involved in the conspiracy are liable for the reasonably foreseeable consequences of the conspiracy including the acts of co-conspirators. *See U.S. v. Silvestri,* 409 F.3d 1311, 1335 (11th Cir. 2005); *U.S. v. Alas,* 196 F.3d 1250, 1251 (11th Cir. 1999); *U.S. v. Mothersill,* 87 F.3d 1214, 1218 (11th Cir. 1996) ("Hence, a court need not assess the individual culpability of a particular conspirator provided the substantive crime was a reasonably foreseeable consequence of the conspiracy.") (internal quotation marks omitted). The trial court gave the jury clear detailed instructions designed to eliminate any confusion of "prejudicial spillover." The jury was carefully instructed to consider each defendant separately as to each count in the indictment. There was no error.

II. *Defendants' Challenge to the District Court's Evidentiary Rulings*

We review the district court's evidentiary rulings for abuse of discretion. *See U.S. v. Lyons,* 403 F.3d 1248, 1250 (11th Cir. 2005).

A. *Miscellaneous Business Records*

The documents at issue are GX 115-1A-(a copy of the outside cover of a MIIT file concerning investor Jack Overmire), GXs 112G, 115-1-G-(exhibits containing investor correspondence), and GX 35-(past-due MIIT notes pertaining to several investors). According to Wey's testimony, these and a series of other MIIT documents had been created and maintained by the defendants in the ordinary course of their business. Thus because "a trial judge has broad discretion to determine the admissibility of [business record] evidence[,]" the court properly admitted these documents as business records pursuant to Fed.R.Evid. 803(6). *U.S. v. Bueno-Sierra*, 99 F.3d 375, 378 (11th Cir. 1996). These business records do not violate the Confrontation Clause because none of them are testimonial.[3]

B. *Abel Flores Reyes' Testimony*

Sinibaldi argues that the district court abused its discretion by allowing the former mayor of San Lorenzo, Nicaragua, Abel Flores Reyes, to testify over the defendants' objections, regarding a conversation he had before executing an agreement which purported to establish a business relationship between the government of San Lorenzo and the Millennium and Stonehedge entities. Reyes stated that during this conversation, Claudia Garcia told him that attorneys

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[3] A record would be testimonial if it was "made under circumstances which would lead the declarant to believe the statement would be available for use at a later trial." *U.S. v. Underwood*, 446 F.3d 1340, 1347 (11th Cir. 2006).

in Miami, Florida, would provide money to build housing for the impoverished in San Lorenzo if he would execute the agreement at issue. According to Sinibaldi, this testimony was inadmissible hearsay and a violation of the Confrontation Clause. We disagree. Reyes' testimony established that no business relationship existed between the government of San Lorenzo and the Millennium and Stonehedge entities. Furthermore, Reyes' testimony about the conversation that prompted him to execute the agreement explained why Reyes had signed it. This challenged testimony was not offered to prove the truth of any matter asserted and therefore it is not hearsay under Fed.R.Evid. 801(c). *See Cargill v. Turpin,* 120 F.3d 1366, 1373 n. 15 (11th Cir. 1997) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted," but evidence that is not offered or admitted for its truth is not hearsay) (internal quotation marks omitted). Rather, it was offered to show his mental state and why he signed the document.

C. *The testimony of Albert Melchoir and Expert Witness Charles Stutts*

Sinibaldi further argues that the district court abused its discretion in allowing Albert Melchoir, an Assistant General Counsel for the State of Florida Office of Financial Regulation, who was primarily responsible for dealing in cases involving securities, to answer questions advanced by Schultz on cross-examination in an "over responsive" manner. Melchoir explained why DBF had sought *ex parte* injunctive relief in October 1999. He stated that as a result of his investigation, he "was certain that Stonehedge had raised about $3 million and were continuing to sell

unregistered securities through unregistered agents." The defendants have never disputed that the Stonehedge offerings were unregistered. They had always maintained that they were exempt from registration.

Sinibaldi next argues that Charles Stutts, the United States' securities expert, gave impermissible legal opinions during his testimony. The record convinces us that the district court properly limited the scope of Stutt's testimony, gave the jury appropriate limiting instructions, instructed the jury on applicable securities law, explained the role of an expert witness, and committed no error.

D. *The Testimony of Receiver Gary Lipson*

Sinibaldi argues that the district court abused its discretion by allowing Gary Lipson, the receiver appointed by DBF, to make "improper commentary," citing comments from Lipson's four days of trial testimony. The district court properly sustained the defendant's objection and instructed the jury to disregard the "improper commentary"[4] [FN4] the defendant objected to. We assume they did.

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[4] During Lipson's cross-examination about a document he had recovered from the defendants, Cuciniello's counsel displayed a portion of the first page of the document on the court's projection system. After some heated questions regarding sections of the document, Lipson made the challenged statement "You're afraid to show the whole page, aren't you?"

E. *Sinibaldi's "RIA" Certification Status*

Sinibaldi argues that the district court should have excluded as propensity evidence a 1998 Lee County yellow pages advertisement, a 1999 brochure advertising an estate planning seminar, and a business card, in which he falsely held himself out to the public as a registered investment advisor or "RIA." Sinibaldi argues this evidence is inadmissible under Fed.R.Evid. 404(b). However, this evidence demonstrated how Sinibaldi had conducted his fraudulent marketing activities during the charged conspiracies. Furthermore, this evidence was "inextricably intertwined with the evidence of the charged offense[s]," *U.S. v. Herre,* 930 F.2d 836, 837 (11th Cir. 1991), and thus Rule 404(b) does not apply. *See U.S. v. Schlei,* 122 F.3d 944, 989-90 (11th Cir. 1997) (concluding that testimony of defendant's unauthorized use of embassy letterhead to market forged financial instruments was "admissible as intrinsic evidence" of the charged scheme to defraud). Even though none of the Government's witnesses indicated that they had placed particular reliance on this specific misrepresentation in deciding whether to invest in MIIT notes, this intrinsic evidence remains relevant and admissible. Specific reliance is not required under the federal fraud statutes. *See Neder v. U.S.,* 527 U.S. 1, 24-25, 119 S.Ct. 1827, 1841, 144 L.Ed.2d 35 (1999). A scheme to defraud must include a material misrepresentation, that is, "one having a natural tendency to influence, or capable of influencing, the decision maker to whom it is addressed." *U.S. v. Hasson,* 333 F.3d 1264, 1271 (11th Cir. 2003), *cert. denied,* 541 U.S. 1056, 124 S.Ct. 2195, 158 L.Ed.2d 755 (2004). Sinibaldi misrepresented that he was a registered RIA, when in actuality, he did not

even have a high school diploma. This misrepresentation gave the false impression that he possessed a high level of professional expertise and experience capable of influencing potential investors.

III. *Whether the District Court Erred in Declining to Substitute Juror Bennet*

Sinibaldi argues that the district court abused its discretion in declining to substitute an alternate for juror Bennett. Under Fed.R.Crim.P. 24(c), "a trial court may, in the exercise of its sound discretion, substitute an alternate juror for a regular juror who has become unable or disqualified to perform h[er] duties." *U.S. v. Holder,* 652 F.2d 449, 451 (5th Cir. Unit B Aug.1981).[5]

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is ... deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

Remmer v. U.S., 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954). "A juror's exposure to extraneous material or influence requires a new trial if the exposure poses a reasonable possibility of prejudice to

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[5] *See Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent in the Eleventh Circuit, all decisions of the former Fifth Circuit announced prior to October 1, 1981).

the defendant." *U.S. v. Khanani*, 502 F.3d 1281, 1291 (11th Cir. 2007) (internal quotations marks omitted). To make a such a showing, "a defendant must establish that an extrinsic contact with a jury, in fact, occurred." *Id.* Once this showing is made, "the burden shifts to the government to prove that the extrinsic contact was not prejudicial." *Id.* "The factual determination of whether consideration of extrinsic evidence caused the defendant prejudice is committed to the trial court's 'large discretion.'" *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1472 (11th Cir. 1992). It must be noted that even though the juror states in her testimony "that the extrinsic information was harmless, [it] is not controlling." *U.S. v. Bolinger*, 837 F.2d 436, 440 (11th Cir. 1988). "The district court may consider such testimony, but it must also consider other factors such as the nature of the extrinsic evidence and the strength of the evidence properly presented by the government against the defendant." *Id.* (quoting *U.S. v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999)).

Juror Bennett's concern was a result of the lunch break on March 8, 2005. Jurors Williams, Glandt, and Bennett were sitting at a table eating when the defense attorneys arrived and sat at the table next to them. One of the lawyer's chair rubbed against the back of juror Bennett's chair. The jurors then quickly finished their lunch and returned to the courthouse. Immediately thereafter, the court informed the defense that juror Williams had told the bailiff that she had a concern about members of the defense who sat near her during the lunch break. During *voir dire*, the district court properly questioned whether any of the jurors had overheard anything said by the attorneys or anyone else at their table in the restaurant. They all

responded in the negative. The court then prohibited the parties, counsel, and witnesses from eating lunch in a portion of the area surrounding the courthouse and separated them from the jury.

The next day, juror Bennett addressed the district court stating that she did not hear what the attorneys were talking about in the restaurant. The jurors were already eating when the defense attorneys chose to sit next to them. She further stated that her stress was because she had been instructed that jurors were not supposed to be close to the attorneys on the case and that the attorneys in the restaurant were "too close for comfort." She had the utmost respect for the court and wanted "to do the right thing" for everyone by reporting what had happened. Juror Bennett further explained that she was stressed due to physical exhaustion from commuting to and from the courthouse and performing her regular job responsibilities after trial each day. Consequently, the court accommodated her by allowing her to stay in a Tampa hotel any night she wanted to rest. The court then assured juror Bennett that the restaurant incident would not be repeated, and that if in the future she felt that she could not continue with her demands as a juror, she should immediately tell the court. Juror Bennett affirmed that she felt better about the situation. We believe these measures immediately resolved the situation. Based on the foregoing, the district court committed no error by allowing juror Bennett to remain on the panel.

IV. *Defendants' Motion for Acquittal on Mail Fraud and Other Challenged Counts of Conviction*

We review *de novo* the district court's denial of a motion for judgment of acquittal and view the evidence in the light most favorable to the verdict. *U.S. v. Byrd*, 403 F.3d 1278, 1288 (11th Cir. 2005). "A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of evidence." *Id.*

"To prove mail fraud, the Government must show that the defendant (1) intentionally participated in a scheme to defraud and (2) used the mails to execute the fraudulent scheme." *U.S. v. Suba*, 132 F.3d 662, 673 (11th Cir. 1998). "The Government must establish only that the fraudulent scheme existed" and circumstantial evidence of criminal intent can be sufficient. *Id.* Furthermore, "[p]roof of a routine practice of using the mail to accomplish a business end is sufficient to support a jury's determination that mailing occurred in a particular instance." *U.S. v. Waymer*, 55 F.3d 564, 571 (11th Cir. 1995).

We find that there is sufficient evidence to prove use of the mails as to mail fraud counts ten and twelve on which Sinibaldi was convicted. These two counts concern MIIT investor Bernard Freund ("Freund"). Robert Freund, Freund's grandson, testified that the election form included with the letter that is the subject of count ten had been completed by Freund, and also both that letter and the letter that is the subject of count twelve had Freund's home address at the time. The form and substance of these letters is sufficient evidence to support the inference that they were mailed. Furthermore, there is evidence that

Millennium entities typically had communicated with investors through the mail.[6]

Sinibaldi further argues that the Government did not prove numerous overt acts alleged in count one concerning the investment returns Sinibaldi falsely had advised Millennium investors they could anticipate. However, for a defendant to be convicted of a conspiracy to defraud pursuant to 18 U.S.C. § 371, the government was only required to prove "an" overt act, not every overt act alleged. *See U.S. v. Ellington,* 348 F.3d 984, 989 (11th Cir. 2003). There is direct evidence of overt acts alleged in the paragraphs Sinibaldi is not now challenging. The record also discloses circumstantial evidence supporting the overt acts in question. The testimony of several investors made clear that Sinibaldi had falsely represented that their MIIT notes would produce a twelve percent profit plus a five percent bonus. This argument fails.

V. *Defendants' Motion for Acquittal on the Conspiracy Charged in Count One*

This Court narrowly reviews an argument that the evidence failed to prove a single, overarching conspiracy and "may reverse a jury's finding that a single conspiracy existed only if the evidence, viewed in the light most favorable to the verdict, could not

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[6] Sinibaldi testified in a sworn statement that the Millenium entities' "standard procedure" was to send documents to and receive documents from investors through mail. Also, Dan Wey testified that the Millenium entities typically had communicated with investors through mail. Furthermore, numerous investors testified that the Millenium entities had communicated with them through mail.

permit reasonable jurors to have found, beyond a reasonable doubt, that there was a single conspiracy." *U.S. v. Anderson*, 326 F.3d 1319, 1327 (11th Cir. 2003) (quoting *U.S. v. Taylor*, 17 F.3d 333, 337 (11th Cir. 1994)). Sinibaldi argues that Millenium and Stonehedge offerings evidenced two separate conspiracies, rather than a single, overarching conspiracy. "Three relevant factors determine whether a single conspiracy existed: (1) whether there was a common goal, (2) the nature of the scheme, and (3) the overlap of the participants." *Id.* "If the proof shows the defendant knew the essential objective of the conspiracy, it does not matter that he did not know all its details or played a very minor role in the overall scheme." *Suba*, 132 F.3d at 672. Furthermore, "[a] single conspiracy may be found where there is a 'key man' who directs the illegal activities, while various combinations of other people exert individual efforts toward the common goal." *Taylor*, 17 F.3d at 337 (quoting *U.S. v. Gonzalez*, 940 F.2d 1413, 1422 (11th Cir. 1991)).

All of these factors are satisfied here. Among other things, the defendants marketed an array of Millennium and Stonehedge offerings, whose common goal was raising funds through the sale of unregistered securities that allegedly would pay interest or other periodic monetary distributions. Furthermore, examples of overlapping included the "Due-Diligence Worksheet" provided to Stonehedge investors, which portrayed MIIT and Schultz as responsible for "help[ing] selected companies go public" and Phillips, Tyrrell, and their respective companies, as responsible for marketing the Stonehedge offerings. Finally, the district court properly instructed the jury on single versus multiple conspiracies. There is ample support

for the jury's finding that Millenium and Stonehedge offerings were part of a single, unified conspiracy.

VI. *Defendant's Claim of a Cumulative Effect of Errors*

We review any errors preserved for appeal, as well as any plain errors, to determine whether the defendant's substantial rights were affected. *See U.S. v. Adams*, 74 F.3d 1093, 1099-1100 (11th Cir. 1996). Sinibaldi argues that the "cumulative effect" of the errors he has alleged on appeal warrants a new trial. "We have held that the cumulative effect of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible." *U.S. v. Thomas*, 62 F.3d 1332, 1343 (11th Cir. 1995) (internal quotation marks omitted). As discussed above, the district court did not err as Sinibaldi contends; therefore, no cumulative errors exist. *See U.S. v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004).

VII. *Whether the District Court Erred in its Calculation of Loss Pursuant to U.S.S.G. § 2F1.1(b)(1)*

Sinibaldi contends that the district court erred in its calculation of the $5,333,374 loss attributed to him and its order of restitution of the same amount. We agree with the district court in holding Sinibaldi responsible for all of the losses attributed to the conspiracy. *See U.S. v. Odom*, 252 F.3d 1289, 1299 (11th Cir. 2001) (explaining that in calculating restitution, "a defendant convicted of participation in a conspiracy is liable not only for her own acts, but also those reasonably foreseeable acts of others

committed in furtherance of the conspiracy."); *U.S. v. Dabbs,* 134 F.3d 1071, 1081 (11th Cir. 1998) ("The calculation of loss for purposes of section 2F1.1 is not an exact science. [Under U.S.S.G. § 2F1.1 cmt., n. 8 (1994)] The loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information.")[7]. The evidence supports the calculation made in this regard and, indeed the sum could have been much larger.

VIII. *Cuciniello's Motions for Judgments of Acquittal or a New Trial*

Cuciniello specifically argues that at the close of the evidence in the Government's case-in-chief, prosecutors had failed to establish ill will, or criminal intent on the part of Appellant. This argument is without merit. "The Government need not produce direct proof of scienter in a mail fraud case ... circumstantial evidence of criminal intent can suffice." *U.S. v. Hawkins,* 905 F.2d 1489, 1496 (11th Cir. 1990). In fact, "[g]uilty knowledge can rarely be established by direct evidence, especially in respect to fraud crimes which, by their very nature, often yield little in the way of direct proof." *Suba,* 132 F.3d at 673. Among other things, Cuciniello incorporated eight of the sixteen Stonehedge entities, was an officer in many of these entities, including being President of the Stonehege Group, Inc., was an authorized signator for ten separate Stonehedge-related bank accounts, was a

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[7] We note that § 2F1.1 has been rolled into § 2B1.1 effective November 1, 2001; however, that change does not affect our discussion of the claims being made in this case.

cardholder of two Stonehedge-related American Express accounts, recruited co-defendant Robert Phillips into the defendants' scheme providing him with guidance after DBF initiated its investigation into the defendants' Florida-based operations, and profited from the sale of MIIT securities without ever investing his own money into any securities. Because the evidence established that Cuciniello actively participated in the organization and operation of the defendants' fraudulent investment scheme, the district court was correct in denying Cuciniello's motions for judgments of acquittal or a new trial.

IX. *Defendants' Motion to Dismiss Based on Prosecutorial Vindictiveness*

We review the district court's denial of a motion to dismiss an indictment based on alleged prosecutorial vindictiveness for abuse of discretion. *See U.S. v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006). In May 2001, the United States sent Cuciniello and his co-defendants letters informing them that they were targets of a pending grand jury investigation. On October 29, 2002, Schultz began a civil class action lawsuit seeking more than $300,000,000 in damages against several of the state and federal agencies and individuals involved in the investigation of the defendants' fraudulent investment scheme, including one of the federal prosecutors assigned to handle this case. Then, on December 10, 2002, the grand jury returned a superseding indictment, adding charges and defendants, including Cuciniello, to the existing indictment. Cuciniello then filed a motion to dismiss the indictment for prosecutorial vindictiveness because the United States had allegedly sought the superseding indictment in retaliation for the civil

action Schultz had filed. Because "[a]s a general rule, the courts are not free to interfere with the prosecuting officer's discretionary decision to prosecute crime,"*U.S. v. Spence*, 719 F.2d 358, 361 (11th Cir. 1983), and because it is clear in the record that the grand jury investigation that resulted in the indictment in this case was begun before Schultz filed his class action lawsuit, *see U.S. v. Corona*, 849 F.2d 562, 567-68 (11th Cir. 1988) (prosecutorial vindictiveness claim fails when government's investigation preceded defendant's exercise of procedural rights), there is no evidence of prosecutorial vindictiveness.

X. *Cuciniello's challenge to the guidelines-range sentence*

"We review the length of a sentence for reasonableness in light of the facts and circumstances of the defendant's case reflecting the sentencing considerations in [18 U.S.C.] § 3553(a)." *U.S. v. Williams*, 456 F.3d 1353, 1363 (11th Cir. 2006); *see U.S. v. Thomas*, 446 F.3d 1348, 1351 (11th Cir. 2006). This review for reasonableness is deferential and the weight accorded to any § 3553(a) factor is up to the discretion of the district court. *Williams*, 456 F.3d at 1363. Cuciniello argues that the massive sentence imposed by the district court was not necessary. The party who challenges the sentence has both the burden of showing that the sentence is unreasonable and the initial burden of establishing that the district court considered an impermissible factor at sentencing. *See id.* at 1361. When reviewing a sentence for reasonableness, this Court must evaluate whether the sentence achieves the purposes of sentencing set out in 18 U.S.C. § 3553(a)(2)(B) & (C). *Id.* Here, Cuciniello

has not identified a section 3553 factor that would support a lesser sentence. Furthermore, because among other things, Cuciniello violated the terms of his pretrial supervised release by attempting to market another investment scheme while on pretrial release, and after a review of the entire record, Cuciniello's 210-month sentence was not unreasonable. The sentence was required to "afford adequate deterrence to criminal conduct" and to "protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(B) & (C).

XI. *Arguments waived because they were not properly raised-and supported-in Cuciniello's brief*

Cuciniello concludes his brief as follows: "Cuciniello reasserts here any and all objections made at trial, including, but not limited to the basis for his mistrial, severance, and new trial motions, as stated at the district court level." Because Cuciniello has failed to identify and support these putative arguments in his brief (other than by incorporating by reference the entire record in this case), he has waived them. *See Kelliher v. Veneman*, 313 F.3d 1270, 1274 n. 3 (11th Cir. 2002).

XII. *Tyrrell's Motions for Judgments of Acquittal or a New Trial*

We review the district court's denial of a Motion for Judgment of Acquittal *de novo*. *See U.S. v. Hansen*, 262 F.3d 1217 (11th Cir. 2001). We review the district court's denial of a Motion for a New Trial for abuse of discretion. *See U.S. v. Ward*, 274 F.3d 1320 (11th Cir. 2001). Tyrrell argues that his Motion for Acquittal

"was premised on the Government's failure to prove scienter in support of the various conspiracy claims raised against him." Tyrrell also argues that "[t]he evidence adduced at Trial did not include any direct or circumstantial evidence of Mr. Tyrrell's knowing participation in an agreement to defraud." Because an abundance of evidence adduced at trial proved Tyrrell's knowing and voluntary participation in the charged conspiracies and because the existence of a conspiracy may be proven by circumstantial evidence, *see U.S. v. Guerra,* 293 F.3d 1279, 1285 (11th Cir. 2002), we hold that the district court correctly denied Tyrrell's motions for judgments of acquittal or, in the alternative, for a new trial.

Conclusion

For the foregoing reasons, the challenged convictions and sentences are **AFFIRMED.**

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 05-14492

[Filed July 30, 2008]

UNITED STATES of America, Plaintiff-Appellee,	)
v.	)
Gene A. TYRRELL, Dean A. Sinibaldi, Joseph Cuciniello, Defendants-Appellants.	)

Appeals from the United States District Court
for the Middle District of Florida

Before EDMONDSON, Chief Judge, CARNES and FAY, Circuit Judges.

BY THE COURT:

Appellants Tyrrell and Sinibaldi have filed "Motion[s] for Rehearing or in the Alternative to File a Supplemental Brief," in which they seek to raise for the first time an issue regarding a jury instruction which has been found deficient by this Court in U.S. v. Svete, 521 F.3d 1308 (11th Cir. 2008).

Appellant Sinibaldi has also filed an "Amended Motion for Rehearing or in the Alternative to File a Supplemental Brief Pursuant to United States v. Santos, 2008 LEXIS 4699 (June 2, 2008)."

As the Appellee correctly points out, this court has previously rejected similar attempts to raise an issue for the first time on rehearing. See U.S. v. Levy, 379 F.3d 1241 (11th Cir. 2004). Therefore, Appellants Tyrrell's and Sinibaldi's motions are DENIED.

Appellant Cuciniello himself has filed a motion to discharge counsel and for a 90-day extension of time to file a petition for rehearing. Appointed attorney Grady Irvin, who represents Appellant Cuciniello in this appeal, has responded, indicating that he reviewed the opinion issued in this appeal and that he determined that there were no meritorious grounds for rehearing.

As Attorney Irvin's response indicates that he has complied with the requirements of Eleventh Circuit Addendum Four, § (f)(5), counsel is not required to be either discharged or to file a motion to withdraw in order for Appellant Cuciniello to file a pro se petition for rehearing. Accordingly, Appellant Cuciniello's motion to discharge counsel is DENIED.

Appellant Cuciniello's motion for an extension of time to file a petition for rehearing is GRANTED IN PART to the extent that Appellant's petition for rehearing will be due within twenty-one (21) days of the date of this Order.

APPENDIX C

15 U.S.C. § 77E(a)

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. 78J(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so

registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall

be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than

$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1956(a)(1)(A)(i)

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> * * *

18 U.S.C. § 1957

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are –

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section –

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.